



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE
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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
DAVID CROSS
FOR
4013 SEAFORD ROAD, YORK COUNTY
VWPP UNPERMITTED**

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and David Cross, regarding the 4013 Seaford Road property, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Compensation" or "Compensatory Mitigation" means (i) the restoration (reestablishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources or (ii) in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit for the purposes of offsetting unavoidable adverse impacts to aquatic resources that remain after all appropriate and practicable avoidance and minimization has been achieved.

3. “Mr. Cross” means David Cross, currently residents of York County, Virginia. Mr. Cross is a “person” within the meaning of Va. Code § 62.1-44.3.
4. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. “Director” means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
6. “Notice of Violation” or “NOV” means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
7. “Order” means this document, also known as a “Consent Order” or “Order by Consent,” a type of Special Order under the State Water Control Law.
8. “Permit” or “Virginia Water Protection Permit” means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act 33 United States Code (“USC”) § 1344).
9. “Property”, “Parcel” or “Site” means 4013 Seaford Road, York County, Virginia.
10. “Regulations” means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 et seq.
11. “State Water Control Law” means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
12. “State waters” means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
13. “Surface water” means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
14. “TRO” means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
15. “USACE” or “ACOE” means the United States Army Corps of Engineers.
16. “Va. Code” means the Code of Virginia (1950), as amended.
17. “VAC” means the Virginia Administrative Code.

18. “VWPP” or “VWP Permit” means Virginia Water Protection Permit as defined in 9 VAC 25-210-10.
19. “Wetlands” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Mr. Cross owns the property located at 4013 Seaford Road, in York County, Virginia. The Property contains nontidal palustrine forested wetlands, which are surface waters of the Commonwealth.
2. On October 15, 2012, the USACE issued a permit (“USACE Permit”)¹ to Mr. Cross, to construct a single family home at the Property. The USACE Permit authorized impacts to 0.099 acres of wetlands and required no compensatory mitigation.
3. On May 6, 2015, the USACE conducted an inspection of the Property and observed that Mr. Cross had constructed the home and exceeded the USACE Permit threshold of 0.099 acres of wetland impacts.
4. On August 11, 2015, February 4, 2016, and January 3, 2017, the USACE mailed non-compliance letters to Mr. Cross documenting unauthorized on-site fill within wetlands based on their May 6, 2015, site visit.
5. On March 3, 2017, the USACE contacted Mr. Cross by email. The USACE again stated that the property contains unauthorized fill gave the following options: 1) remove all fill in wetlands such that the permanent wetland impacts do not exceed 0.10 acres; 2) apply for an after the fact permit for the impacts that shows that the impacts could not be avoided or reduced; 3) complete a combination of options one and two, removing some fill and applying for some to remain.
6. On April 8, 2019, USACE requested DEQ attend a site visit to the subject property.
7. On April 24, 2019, DEQ staff conducted an inspection of the Property with the USACE, the United States Environmental Protection Agency (“EPA”), who was present at the request of USACE, and Mr. Cross. DEQ observed that, in addition to areas subject to the USACE Permit, areas that had been filled had also been cleared of forested wetland

¹ The USACE Permit application number is NAO-2002-280/12-V1251. On October 15, 2012, in the USACE Permit transmittal letter, the USACE stated the following: 1) the impacts, as proposed in the application, satisfies the criteria contained in the USACE Nationwide Permit (18); 2) provided the project specific conditions and the Nationwide Permit General Conditions are met, and individual USACE Permit will not be required; 3) and the DEQ has provided a conditional §401 Water Quality Certification for Nationwide Permit Number 18.

vegetation. The unauthorized fill was comprised of sandy material, mulch, stone, landscaped beds, lawn, and portions of the driveway. The EPA took auger samples to determine the depth of the fill, which ranged from a few inches to over a foot.

8. On May 14, 2019, the EPA provided a Property Map (“EPA Property Map”) based on satellite imagery containing overlays depicting the fill that was authorized by the USACE Permit and the unauthorized fill area (*See*, Appendix B “Property Map”). Subsequently, on May 14, 2019, DEQ staff conducted a file review and observed the following:
 - a. Based on the EPA Property Map, approximately 0.38 acres of forested wetlands were cleared and filled without any agency authorization and 0.10 acres were filled under the USACE Permit, totaling 0.48 acres of wetland impacts.
 - b. The unauthorized impacts exceed the USACE Permit threshold. As a result, in accordance with compensatory mitigation policy, all impacts associated with the project require compensatory mitigation when the impacts exceed 1/10 of an acre.
 - c. Due to Mr. Cross’s failure to comply with the project specific conditions and the Permit general conditions, by impacting greater than 0.1 acres, the DEQ §401 Certification is not applicable, and a VWP permit would be required.
 - d. A VWP permit had not been issued for the impacts greater than the USACE authorized impacts.
9. 9 VAC 25-210-50(A) states “Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters; withdraw surface water; otherwise alter the physical, chemical, or biological properties of state waters regulated under this chapter and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; excavate in wetlands; or on or after October 1, 2001, conduct the following activities in a wetland: 1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; 2. Filling or dumping; 3. Permanent flooding or impounding; or 4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.”
10. Va. Code § 62.1-44.5 states “A. Except in compliance with a certificate or permit issued by the Board or other entity authorized by the Board to issue a certificate or permit pursuant to this chapter, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; 2. Excavate in a wetland; 3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; or 4. On and after October 1, 2001, conduct the following activities in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions...”

11. Va. Code § 62.1-44.15:20(A) states “Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: 1. Excavate in a wetland; 2. On or after October 1, 2001, conduct the following in a wetland: a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; b. Filling or dumping; c. Permanent flooding or impounding; or d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or 3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.”
12. On May 31, 2019, DEQ issued Mr. Cross NOV No. 1905-001071 for unauthorized wetland impacts in exceedance of the USACE Permit threshold which limited discharges to 1/10 of an acre, failure to obtain a VWP permit for the wetland impact exceedances, and for failure restore the wetlands or purchase mitigation credits for all unrestored areas, as described in paragraphs C(7) - (11), above.
13. On July 19, 2019, DEQ enforcement staff met with Mr. Cross at the Property to inspect the property and to discuss the enforcement process and inform Mr. Cross that he would need to restore the impacted wetland areas, purchase mitigation credits for all impacts, or a combination thereof. Mr. Cross stated that he would provide a plan.
14. Based on the April 24, 2019, Inspection, the May 31, 2019 Review, and the July 19, 2019, Inspection, the Board concludes that Mr. Cross has violated 9 VAC 25-210-50(A), Va. Code § 62.1-44.5, and Va. Code § 62.1-44.15:20(A), as described in paragraphs C(4) – C(8), above.
15. In order for Mr. Cross to return to compliance, DEQ staff and Mr. Cross have agreed to the Schedule of Compliance requiring restoration the impacted wetland areas, purchase mitigation credits for all impacts, or a combination thereof, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Mr. Cross, and Mr. Cross agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$13,650 in settlement of the violations cited in this Order. The civil charge shall be paid in accordance with the following schedule:

Due Date	Amount
Within 30 day of execution of Order	\$3,650 or balance
April 1, 2021	\$2,000 or balance

July 1, 2021	\$2,000 or balance
October 1, 2021	\$2,000 or balance
January 1, 2022	\$2,000 or balance
April 1, 2022	\$2,000

3. If the Department fails to receive a civil charge payment pursuant to the schedule described above, the payment shall be deemed late. If any payment is late by 30 days or more, the entire remaining balance of the civil charge shall become immediately due and owing under this Order, and the Department may demand in writing full payment by Mr. Cross. Within 15 days of receipt of such letter, Mr. Cross shall pay the remaining balance of the civil charge. Any acceptance by the Department of a late payment or of any payment of less than the remaining balance shall not act as a waiver of the acceleration of the remaining balance under this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Mr. Cross shall include his Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Mr. Cross shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Mr. Cross for good cause shown by Mr. Cross, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 1905-001071, dated May 31, 2019. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Mr. Cross admits to the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order.


4. Mr. Cross consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Mr. Cross declares he have received fair and due process under the Administrative Process Act and the State Water Control Law and waive the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Mr. Cross to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Mr. Cross shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Mr. Cross shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Mr. Cross shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by the Dews and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. Any documents to be submitted pursuant to this Order shall be submitted by the Dews or an authorized representative of the Dews.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By their signatures below, the Dews voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 16 day of October, 2020.



Craig Nicol, Regional Director
Department of Environmental Quality

Christopher and Veronica Drew voluntarily agree to the issuance of this Order.

David Cross voluntarily agree to the issuance of this Order.

Date: 8/14/2020 By: [Signature]
(Person)
David Cross

Commonwealth of Virginia

City/County of York

The foregoing document was signed and acknowledged before me this 14 day of
August, 2020, by David Cross

Amanda M. Sharp
Notary Public

7117110
Registration No.

My commission expires: April 30, 2023

Notary seal:



APPENDIX A

SCHEDULE OF COMPLIANCE

1. No later than 90 days from the effective date of this Order, Mr. Cross shall submit an approvable Corrective Action Plan (“CAP”) for the restoration of unauthorized wetland impacts identified in the Appendix B Property Map that meets the requirements of 9 VAC 25-210-116. The CAP must be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters in accordance with 9 VAC 25-210-116.
2. Mr. Cross shall respond to any DEQ comments regarding the CAP within 14 calendar days of receipt.
3. Upon DEQ approval of the CAP, Mr. Cross shall begin implementation of the CAP in accordance with the schedule contained therein. Any changes to the approved CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Mr. Cross shall complete the CAP in accordance with its terms.
 - a. If the performance criteria specified in the approved CAP are not achieved at the end of the applicable monitoring period, then Mr. Cross shall so advise DEQ in the applicable monitoring report for that monitoring period and shall describe why the criteria could not be achieved. Mr. Cross shall submit to DEQ for review and approval a revised CAP as part of the applicable monitoring report to achieve the performance criteria. Upon DEQ approval, the revised CAP shall then be implemented by Mr. Cross in accordance with the schedule set forth in the revised CAP to meet performance criteria. Wetland restoration monitoring shall last for at least three years, with an option to petition for early termination if the performance criteria has been met.
 - b. If the performance criteria specified in the approved CAP or any revised CAP are not achieved by the end of the year three monitoring period and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then Mr. Cross shall submit to DEQ for review and approval, within 30 days of such determination, a proposal to purchase mitigation bank credits or contributions to an in-lieu fee fund to address any remaining unrestored wetlands on the Property. Mr. Cross shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.
4. Unless otherwise specified in this Order, Mr. Cross shall submit all requirements of Appendix A of this Order to:
Enforcement
DEQ – Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462

APPENDIX B PROPERTY MAP

